IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1902

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,
Petitioner,
v.
CONSOLIDATED EXPRESS, INC., and TWIN EXPRESS, INC.,
Respondents.

No. 78-1905

NEW YORK SHIPPING ASSOCIATION, INC., *et al.*,
Petitioners,
v.
CONSOLIDATED EXPRESS, INC., and TWIN EXPRESS, INC.,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

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Respondents, Consolidated Express, Inc. ("Conex") and Twin Express, Inc. ("Twin"), respectfully request that the Court deny the petitions for writs of certiorari seeking review of the Third Circuit's decision in these cases. The opinion below, which is not yet officially reported, is reproduced as Appendix A in the separately

bound joint appendix to the petitions in Nos. 78-1902 and 78-1905, at 1a-71a.[1]

STATEMENT OF THE CASE

A. NATURE OF THE CASES

In 1973 and 1974, Conex and Twin were subjected by petitioners to a blatant boycott which brought their businesses to the brink of destruction. Respondents brought these suits to recover damages for the injuries they sustained as a result of that boycott from: (1) petitioner International Longshoremen's Association, AFL-CIO ("ILA") under § 303 of the Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 187; and (2) ILA, petitioners New York Shipping Association, Inc. ("NYSA"), Sea-Land Service, Inc. ("Sea-Land"), Seatrain Lines, Inc. ("Seatrain"), and certain other members of NYSA, under §§ 1, 2 and 3 of the Sherman Act, 15 U.S.C. §§ 1, 2 and 3, and § 4 of the Clayton Act, 15 U.S.C. § 15.

B. FACTUAL BACKGROUND

Conex and Twin are non-vessel-owning common carriers authorized by the Federal Maritime Commission to engage in the business of consolidating less-than-container load ("LCL") cargo for shipment between the Port of New York and Puerto Rico. Using Teamster-represented labor, respondents pack or "stuff" small shipments of several customers into large containers at their off-pier facilities and then truck the filled containers to the piers to be loaded aboard ship. Inbound containers, conversely, are picked up at the piers and trucked to respondents' terminals, where they are unpacked or "stripped" and the cargo distributed to its consignees. (App. A at 4a)

[1] References are to pages of the separately bound appendix jointly filed by petitioners in Nos. 78-1902 and 78-1905.

Sea-Land and Seatrain were two of the only three steamship carriers operating between the Port of New York and Puerto Rico.[2] Because their vessels could carry only their own specially-designed containers, no consolidator could remain in the New York-Puerto Rico shipping trade without access to these carriers' empty containers. Prior to 1973, Sea-Land and Seatrain freely provided Conex and Twin with the necessary containers as part of their normal business operations. (App. A at 5a, 7a)

The vehicle for petitioners' attempt to drive Conex and Twin out of business, and thereby to acquire for themselves the work of consolidating LCL cargo lots, was the so-called Rules on Containers ("Rules"). Initially adopted in 1969 as provisions in the 1968-71 collective bargaining agreement between ILA and NYSA, the Rules provided that all containers of consolidated LCL cargo originating from or to be delivered to a point within fifty miles of the Port of New York would be stripped by longshoremen at the piers. Outbound cargo would then be re-stuffed into a container before loading aboard ship; inbound cargo was to be left on the pier for pickup by the consignees.[3] (App. A at 6a; App. C at 77a-78a) The delays, cargo damage and losses and additional charges resulting from this wholly unnecessary rehandling would have made it economically impractical for small shippers to continue using the services of consolidators. (App. A at 47a) But prior to 1973, the Rules were not consistently enforced against anyone. (App. A at 7a)

[2] The third carrier, Transamerica Trailer Transport, Inc., is not a party to these actions. (App. A at 7a n.1)

[3] The Rules were carried forward with only a few slight amendments in the 1971-74 collective bargaining agreement between ILA and the Council of North Atlantic Shipping Associations ("CONASA"), an employer bargaining unit composed of NYSA and employer associations in five other North Atlantic ports. (App. A at 7a)

The situation changed dramatically in early 1973. At a meeting in Dublin, Ireland in January of that year, representatives of CONASA, NYSA and ILA agreed upon new mechanisms for enforcement of the Rules against off-pier consolidators. This agreement, known as "Interpretive Bulletin No. 1" or the "Dublin Supplement," explicitly provided that off-pier consolidators located within fifty miles of the Port of New York were to be considered as operating in "violation" of the Rules. Such "violators" were to be identified and blacklisted, and the steamship carriers agreed not to furnish containers to them. The agreement was to be policed by a joint ILA-NYSA Container Committee. Vessel owners were to be fined $1,000 for each container found on a "violator's" premises. Any consolidator that relocated its terminal beyond the fifty-mile limit would be considered a "runaway shop" and remain subject to the Rules. (App. A at 7a-8a; App. C at 78a-80a)

The boycott of Conex and Twin began almost immediately thereafter. In February, 1973, Sea-Land and Seatrain, using ILA labor, commenced stripping and restuffing Conex's and Twin's outbound LCL containers. Beginning in March, 1973, Sea-Land and Seatrain refused to supply Conex and Twin with empty containers. In April, 1973, NYSA and ILA issued a joint notice to all NYSA members naming fourteen consolidators, including Conex and Twin, as operating in "violation" of the Rules. That notice activated the provision in the Dublin Supplement requiring all NYSA members to refuse containers to the listed companies. (App. A at 8a) These actions had the effect of virtually terminating respondents' business of freight consolidation in the New York-Puerto Rico trade. (App. A at 8a)

C. THE PROCEEDINGS BEFORE THE NATIONAL LABOR RELATIONS BOARD

Faced with the imminent destruction of its business, on June 1, 1973, Conex filed unfair labor practice charges with the National Labor Relations Board ("NLRB"). It alleged that the Rules and Dublin Supplement constituted illegal "hot cargo" agreements under § 8(e) of the National Labor Relations Act, 29 U.S.C. § 158(e), and that ILA's enforcement of those agreements violated the secondary boycott prohibitions of § 8(b)(4) of the Act, 29 U.S.C. § 158(b)(4). The NLRB issued administrative complaints against ILA and NYSA and, acting pursuant to § 10(*l*) of the Act, 29 U.S.C. § 160(*l*), the NLRB's Regional Director petitioned the United States District Court for the District of New Jersey for a preliminary injunction prohibiting continued implementation of the Rules and Dublin Supplement until final disposition of the matter by the Board. (App. A at 8a-9a)

After a lengthy hearing, Judge Lacey found that Conex could not remain in business if enforcement of the Rules continued and, on September 18, 1973, granted injunctive relief. *Balicer* v. *International Longshoremen's Ass'n*, 364 F. Supp. 205 (D.N.J.), *aff'd per curiam*, 491 F.2d 748 (3d Cir. 1973). Following a separate hearing on substantially identical charges filed with the NLRB by Twin, Judge Lacey also granted a preliminary injunction in that case. *Balicer* v. *International Longshoremen's Ass'n*, 86 L.R.R.M. 2559 (D.N.J. 1974). (App. A at 9a)

The Conex and Twin charges were consolidated for hearing before the NLRB.[4] On December 4, 1975, the

[4] The parties stipulated that the extensive records compiled before Judge Lacey, as supplemented by affidavits submitted by intervenor International Brotherhood of Teamsters, Local 807, which represented Conex's employees, and by additional affidavits submitted by ILA and NYSA, would constitute the record for the unfair labor practice proceedings. (App. A at 9a, 20a)

NLRB unanimously concluded that the Rules and Dublin Supplement were "make work" agreements, designed to acquire for petitioners the work of stuffing and stripping LCL containers which traditionally had been performed off-pier by employees outside the longshoremen unit. The Board therefore held that the Rules and Dublin Supplement had no lawful work preservation objective and that, by entering into them, ILA and NYSA had violated § 8(e). The Board further held that ILA had violated the secondary boycott prohibitions of § 8(b)(4)(ii)(B) by attempting to enforce the unlawful agreements. *International Longshoremen's Ass'n (Consolidated Express, Inc.)*, 221 NLRB 956, 961 (1975), *aff'd sub nom. International Longshoremen's Ass'n* v. *NLRB*, 537 F.2d 706 (2d Cir. 1976), *cert. denied*, 429 U.S. 1041, *reh. denied*, 430 U.S. 911 (1977). (App. A at 9a-11a; App. C at 81a-85a)[5]

D. THE PROCEEDINGS BELOW

The complaints in these cases each allege in Count I that petitioners' refusal to deal and coercive stripping and stuffing of respondents' LCL containers constituted a group boycott of Conex and Twin in violation of §§ 1 and 3 of the Sherman Act.[6] In Count III, Conex and Twin alleged that ILA should respond in damages for the injuries they sustained as a result of the union's unfair labor practice as provided under § 303 of the LMRA. Based upon the NLRB's binding determinations of fact and law, and also upon the express terms and

[5] A petition for reconsideration and recall of mandate was denied by the Second Circuit on December 16, 1977. A subsequent petition to the NLRB to reopen the unfair labor practice hearing was denied on August 12, 1978. (App. A at 11a)

[6] Count II charges all petitioners with monopolizing or attempting to monopolize the business of stuffing and stripping LCL cargo in the Port of New York in violation of § 2 of the Sherman Act, 15 U.S.C. § 2. Summary judgment was not sought as to this count.

admitted implementation of petitioners' agreements, respondents moved for partial summary judgment on the issue of liability on both counts. (App. A at 11a-12a; App. C at 85a-86a)

1. *The Decision of the District Court*

The District Court denied summary judgment on both counts. (App. C at 120a; App. D at 122a) With respect to respondents' § 303 claims, it held that the NLRB's prior decision collaterally estopped ILA from denying that it had committed an unfair labor practice and that the actions were not time-barred under the applicable New Jersey statute of limitations. (App. C at 89a, 95a) In its view, however, if respondents were required to obtain freight forwarder permits from the Interstate Commerce Commission ("ICC"), their failure to do so would bar their recovery under § 303. (App. C at 92a) The District Court also ruled that a defense of equitable estoppel might lie against respondents on these claims if it could be shown that they had engaged in illegal conduct to circumvent enforcement of the Rules prior to 1973. (App. C at 97a)

With respect to respondents' Sherman Act claims, the District Court also held that the NLRB's findings and conclusions were not determinative. (App. C at 108a) In its view, the questions whether petitioners' conduct was immune from antitrust scrutiny under the non-statutory labor exemption doctrine and whether their activities violated the Sherman Act were "inseparable". (App. C at 98a) Refusing to apply the *per se* doctrine of antitrust liability solely because of the labor relations context of these cases, it held that a full-scale rule of reason inquiry was required on the issues of anticompetitive intent and effect. (App. C at 108a-110a, 113a-114a) The District Court further ruled that Conex's and Twin's failure to obtain an ICC permit would, if such a permit were re-

quired, bar recovery of damages under § 4 of the Clayton Act. (App. C at 120a)

The District Court certified its order (App. D at 121a-122a) for interlocutory appeal under 28 U.S.C. § 1292 (b) on February 22, 1978. (App. F at 126a-127a)

2. *The Decision of the Court of Appeals*

The Court of Appeals affirmed the District Court's application of collateral estoppel to the NLRB's unfair labor practice determination and agreed that respondents' § 303 claims were not time-barred under the applicable New Jersey statute of limitations. (App. A at 22a, 26a) Reversing the court below, however, the Third Circuit concluded that, based upon undisputed facts of record, ILA could not establish critical elements of an equitable estoppel defense. (App. A at 32a) The Court of Appeals also rejected ILA's so-called "illegality" defense, viewing it as reminiscent of the long discredited "trespasser on the highway" doctrine. (App. A at 27a, 28a) Accordingly, it ordered that summary judgment be entered against the union on Count III of the complaints. (App. A at 4a, 33a; App. B at 73a) These rulings are the subject of the ILA's petition in *International Longshoremen's Ass'n* v. *Consolidated Express, Inc., et al.*, No. 78-1902.

Turning to respondents' antitrust claims, the Court of Appeals held that since the NLRB had conclusively determined that petitioners' agreements were illegal under the labor laws, nothing in the national labor policy warranted immunizing their conduct from antitrust sanctions. (App. A at 47a-48a, 50a) After finding that the Rules and Dublin Supplement "have horizontal, vertical, and coercive aspects" whose "necessary effect" was to drive Conex and Twin from the New York-Puerto Rico shipping market (App. A at 57a, 58a), the Third Circuit

further held that the container boycott fell within the categories of restraints traditionally deemed *per se* unlawful under the Sherman Act. (App. A at 60a, 61a) Finally, the court rejected petitioners' so-called "illegality" defense as being essentially no different than the *pari delicto* defense rejected in *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968). (App. A at 63a-65a) These rulings are the subject of the various non-union parties' petition in *New York Shipping Ass'n, Inc., et al.* v. *Consolidated Express, Inc., et al.*, No. 78-1905.

Despite these holdings, the Court of Appeals affirmed the District Court's denial of summary judgment on respondents' antitrust claims. (App. A at 55a, 67a; App. B at 73a) It held that petitioners may yet establish a complete defense to treble damages liability if, on remand, it could be shown that: (1) there was no reasonable foreseeability that the agreements in question would be held to violate the labor laws, and (2) the restraint imposed on the secondary market went no further than was reasonably necessary to accomplish a labor objective thought to have been legitimate. (App. A at 53a-54a) The validity of this defense under § 4 of the Clayton Act is the subject of respondents' Conditional Cross-Petition for a Writ of Certiorari in *Consolidated Express Inc., et al.* v. *New York Shipping Ass'n, Inc., et al.*, filed concurrently herewith. The non-union petitioners in No. 78-1905 seek review of the standards articulated by the Third Circuit for meeting this new defense.

ARGUMENT

A. THE PETITION IN NO. 78-1902

In scattershot fashion, the ILA's petition, No. 78-1902, asserts that there are ten questions for this Court's review concerning the Third Circuit's decision with respect to respondents' § 303 claims. In reality, the Court of Appeals' rulings on these claims reduce to four discrete issues. None raises a novel issue of law and none is sufficiently important to warrant this Court's attention.

1. *Appropriateness of Collateral Estoppel*

Like the court below, every court of appeals which has considered the applicability of the collateral estoppel doctrine in this context since *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394 (1966), has refused to permit relitigation of an NLRB unfair labor practice determination in a subsequent suit for damages under § 303 of the LMRA.[7] ILA is seeking certiorari in the face of this unbroken line of authority and despite the fact that the decision when to apply collateral estoppel is committed to the "broad discretion" of the lower courts. *Parklane Hosiery Co.* v. *Shore*, 47 U.S.L.W. 4079, 4082 (U.S. Jan. 9, 1979).

ILA asserts that the decision below establishes a new standard of "unfairness" for litigants attempting to avoid the bar of collateral estoppel. It does not. Rather, the Court of Appeals held only that ILA could not show that the NLRB proceeding had been unfair *in these cases.* Since the union had deliberately chosen not to seek or

[7] International Wire v. Local 38, IBEW, 475 F.2d 1078 (6th Cir.), *cert. denied*, 414 U.S. 867 (1973); Texaco, Inc. v. Operative Plasterers & Cement Masons, 472 F.2d 594 (5th Cir.), *cert. denied*, 414 U.S. 1091 (1973); Paramount Transport Systems v. Teamsters, Local 150, 436 F.2d 1064 (9th Cir. 1971); Painters District Council No. 38 v. Edgewood Contracting Co., 416 F.2d 1081 (5th Cir. 1969).

introduce any additional evidence before the NLRB,[8] the Third Circuit reasoned that the alleged inadequacies in the Board's discovery procedures could not have affected the outcome of the NLRB proceeding in any way. *Cf. Parklane Hosiery Co.* v. *Shore*, *supra*, 47 U.S.L.W. at 4082. (App. A at 19a-20a) The decision thus turns entirely upon the particular facts and circumstances of these parties' prior litigation and cannot be deemed an abuse of the lower courts' discretion.

The lengthy history of the NLRB proceedings and the multiplicity of appeals it spawned should itself be sufficient to refute ILA's additional contention that it was denied an "adequate opportunity to litigate" before the Board. The NLRB, the Second Circuit and the Third Circuit have already refused to permit ILA to relitigate the Board's unfair labor practice determination. *See* note 5, *supra.* Given that this Court considered these same arguments and denied certiorari when it was sought directly in the NLRB cases,[9] ILA's newest collateral attack on the Board's decision should not occupy this Court's attention.

[8] *See* note 4, *supra.* ILA also assured the administrative law judge that "there [were] no material issues of credibility in the record before the [Board] for resolution requiring a formal hearing," and that the unfair labor practice charges "[could] be fully resolved on the basis of the exhibits and transactions of testimony entered in the [preliminary injunction hearing]." (App. A at 20a)

[9] ILA vigorously argued its disagreement with the Board's definition of the "work in controversy" and pressed its own version of the alleged "facts" pertaining to respondents' history of off-pier consolidating work in the preliminary injunction hearing before Judge Lacey, Balicer v. International Longshoremen's Ass'n, *supra*, 364 F. Supp. 214-16; and, thereafter, to the NLRB's administrative law judge, *see* 221 NLRB at 971-74; to the Board, *see* 221 NLRB at 959-60; to the Second Circuit, *see* 537 F.2d at 711; and twice before to this Court. *See* Petition for a Writ of Certiorari, International Longshoremen's Ass'n v. NLRB, No. 76-570, at 10, 12; Joint Petition for Rehearing of Orders Denying Petitions for a Writ of Certiorari, New York Shipping Ass'n, Inc. v. NLRB, No. 76-569; International Longshoremen's Ass'n, No. 76-570, at 3.

2. *Sufficiency of Equitable Estoppel Defense*

In rejecting the ILA's claimed equitable estoppel defense, the Third Circuit did nothing more than apply settled law to the uncontroverted facts of record (App. A at 31a-32a) Despite ILA's present contention that the court below misapplied the standards for a grant of summary judgment, it has previously conceded that the Third Circuit's approach to resolution of the equitable estoppel claim *"was, of course, appropriate to a traditional motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure."* [10]

The Court of Appeals found that ILA could not make out the elements of an equitable estoppel defense. ILA, in effect, is asking this Court to do nothing more than review the sufficiency of the evidence supporting that decision. Since the relevant facts urged by respondents in support of the motion and relied upon below appeared in affidavits and documentary materials authored or submitted by ILA (*e.g.*, App. A at 32a & n.14), nothing in *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144 (1970), or in Rule 56(c), Fed. R. Civ. P., required respondents to submit additional evidence to show that ILA's admissions were undisputed or to disprove ILA's unsupported and nonmaterial factual allegations.[11]

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[10] Petition for Rehearing Not In Banc, filed by ILA in the Third Circuit on April 27, 1979, at 4 (emphasis supplied). For the convenience of the Court, a copy of this petition has been lodged with the Clerk.

[11] There is no truth to ILA's bald assertion that respondents "conceded the facts" purportedly relevant to this defense. The NLRB's administrative law judge found ILA's charges that respondents engaged in illegal conduct to avoid enforcement of the Rules unpersuasive, 221 NLRB at 971, and respondents have objected to ILA's persistent interjection of these baseless slurs at every stage of this proceeding. The Court of Appeals in no way "precluded" ILA from presenting its evidence; there simply is none.

3. *Statute of Limitations*

Contrary to ILA's contention, there is no conflict between *Cope* v. *Anderson*, 331 U.S. 461 (1947), and the Third Circuit's decision that the statute of limitations governing federal rights of action under § 303 should be determined by reference to federal statutory policy instead of the complicated conflicts of law analysis applicable to suits arising under state law. (App. A at 25a) Indeed, if *Cope* were dispositive of the question presented here, as ILA claims, then this Court's subsequent reservation of decision on precisely this issue in *UAW* v. *Hoosier Cardinal Corp.*, 383 U.S. 696, 705 n.8 (1966), would have been meaningless.

But since *Cope* involved the application of a state's "borrowing statute," it may easily be distinguished from the instant cases. Statutory borrowing rules, where they have been enacted, are part and parcel of the state's statute of limitations; one cannot be applied without the other.[12] There is no similar reason, however, to apply non-statutory conflicts of law principles designed to reconcile competing state interests when the cause of action is federally created.[13] To the contrary, this Court has previously stated that the questions of which state statute is to be borrowed and how it is to be applied to a federal right of action without an express limitations period are federal law questions to be resolved in light of the underlying statutory policy. *UAW* v. *Hoosier Cardinal Corp.*,

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[12] The two circuit court decisions ILA relies upon, Arneil v. Ramsey, 550 F.2d 774, 779 (2d Cir. 1977); Burns v. Union Pacific Railroad, 564 F.2d 20, 21-22 (8th Cir. 1977), likewise involved application of statutory borrowing rules.

[13] ILA's reliance upon the *Rules of Decision Act*, 28 U.S.C. § 1652, is misplaced. That statute, as it has consistently been interpreted since Erie Railroad Co. v. Tompkins, 304 U.S. 64, 72-73 (1938), deals only with the law governing causes of action arising under state law. *E.g.*, Guaranty Trust Co. v. York, 326 U.S. 99 (1945); Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487 (1941).

supra, 383 U.S. at 701; *Holmberg* v. *Armbrecht*, 327 U.S. 392, 395 (1946). The decision below is fully consistent with these precedents.

There is an additional reason why the Third Circuit's statute of limitations ruling is particularly ill-suited for a grant of certiorari. Both courts below agreed that the statute of limitations governing respondents' § 303 claims would be that of New Jersey even under the conflicts analysis which ILA seeks to have this Court impose. (App. A at 26a n.12; App. E at 123a-125a) There is no reason therefore to expect any different outcome if such an analysis were required.[14]

4. *Sufficiency of "Illegality" Defense*

ILA does not cite a single case in which an "illegality" defense has been recognized in a § 303 action, and neither the District Court nor respondents has been able to find one. The defense is not recognized by the NLRB in unfair labor practice cases, *International Longshoremen's Ass'n (Dolphin Forwarding, Inc.)*, 236 NLRB No. 42 (1978), *appeal pending sub nom. International Longshoremen's Ass'n* v. *NLRB* (D.C. Cir. No. 78-1510); *NLRB* v. *Springfield Building & Construction Trades Council*, 262 F.2d 494 (1st Cir. 1958), or under analogous federal statutes, *see infra* at 22-24.

ILA's only argument in support of the petition is that the decision below conflicts with the holding in *Teamsters Local 20* v. *Morton*, 377 U.S. 252, 260 (1964), that the § 303 remedy is compensatory in nature. But that

[14] ILA finally urges this Court to "establish a uniform national limitations period" applicable to § 303 actions and suggests that the six-month statute of limitations for unfair labor practice charges be adopted. An identical invitation was expressly rejected in UAW v. Hoosier Cardinal Corp., *supra*, 383 U.S. at 701-703, *distinguishing* Teamsters Local 174 v. Lucas Flour Co., 369 U.S. 95 (1962), and for the reasons stated there, ILA's invitation should likewise be rejected.

case holds only that punitive damages are not recoverable under § 303. Since respondents do not seek punitive damages, there is no conflict. Moreover, Congress clearly believed that "the threat of a suit for damages [would be] a tremendous deterrent to the institution of secondary boycotts",[15] and *Morton* does not suggest otherwise. As recognition of an "illegality" defense would undermine this underlying statutory purpose, its rejection by the Third Circuit signifies no departure from settled legal principles.

B. THE PETITION IN NO. 78-1905

1. *Review of the Third Circuit's Antitrust-Related Rulings Is Premature*

The petition in No. 78-1905 presents four questions directed at the Third Circuit's interlocutory rulings with respect to respondents' Sherman Act claims. Since the Court of Appeals affirmed the District Court's *denial* of summary judgment on the antitrust claims and remanded the cases for a determination by the lower court as to whether petitioners can establish a complete defense to treble damages liability under § 4 of the Clayton Act, all of the Questions Presented by the petition are premature for review by this Court.

If petitioners are successful on remand, there will be no need for this Court to pass upon the antitrust issues they now raise. If petitioners are unsuccessful, they will have full opportunity to seek the Court's review after the proceedings below are concluded. By seeking certiorari at this time, petitioners are asking this Court to rule upon issues which ultimately may have no impact on the outcome of these cases. For this reason alone, the petition

[15] 93 CONG. REC. 5060 (1946); II Leg. Hist. of Labor-Management Relations Act of 1947, at 1371 (remarks of Sen. Taft, author of the bill which became § 303(b)), *cited in* Twin Excavating Co. v. Garage Attendants Local 731, 337 F.2d 437, 438 (7th Cir. 1964).

in No. 78-1905 should be denied. Moreover, as will be demonstrated below, the decision of the Court of Appeals is not in conflict with any decision of this Court or any decision of another Court of Appeals. There is no need, therefore, for the Court to decide these questions until the factual record has been fully developed and the proceedings below are concluded.

2. *The Decision Does Not Conflict With Other Non-Statutory Labor Exemption Decisions*

In holding that petitioners' conduct was not entitled to antitrust immunity, the Third Circuit reasoned that an illegal "work acquisition" agreement is neither a mandatory subject of collective bargaining nor a legitimate union interest that "falls within the protection of the national labor policy." (App. A at 47a-48a)[16] That ruling is firmly supported by this Court's decisions requiring that the availability of the non-statutory labor exemption be determined "in the light of the national labor policy" as it is expressed in the National Labor Relations Act. *Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676, 689-90 (1965) (White, J.); *id.* at 710 n.18, 732-33 (Goldberg, J., concurring and dissenting); *United Mine Workers* v. *Pennington*, 381 U.S. 657, 665-67 (1965); *see also Connell Construction Co.* v. *Plumbers & Steamfitters*, 421 U.S. 616, 622-23, 626 (1975). Absent an intercircuit conflict, therefore, there is no need for this Court to reiterate these principles.

Petitioners purport to find such a conflict with the Second Circuit's decisions in *Intercontinental Container Transport Corp.* v. *New York Shipping Ass'n*, 426 F.2d 884 (2d Cir. 1970) (*"ICTC"*); and *Commerce Tankers Corp.* v. *National Maritime Union*, 553 F.2d 793 (2d Cir.), *cert. denied*, 434 U.S. 923 (1977). But *ICTC* did

[16] "Work acquisition," far from being encouraged or promoted, is strongly condemned by the national labor policy. NLRB v. Enterprise Ass'n of Pipefitters, 429 U.S. 507, 528 n.16 (1977).

not consider the question whether a prior unfair labor practice determination by the NLRB would remove the non-statutory labor exemption and, therefore, is not on point.[17] As for *Commerce Tankers*, the Second Circuit's actual holding was that it would be "inappropriate for us to decide" whether the NLRB's prior unfair practice decision removed the labor exemption because the District Court had not ruled on the issue and it had been briefed to the Court of Appeals by only one party. 553 F.2d at 802. The Second Circuit's comments on the scope of the labor exemption therefore are merely *dicta*. None of the remaining cases cited by petitioners involved a prior NLRB adjudication that the specific conduct alleged violated the National Labor Relations Act and, for this reason, all are distinguishable from the decision below.[18]

[17] It is also important to note that *ICTC* did not uphold the validity of the Rules as petitioners claim. Rather, the Second Circuit's opinion in *ICTC* was rendered only in the context of a motion for a preliminary injunction; the case never proceeded to a determination on the merits either by the court or by the NLRB. Moreover, *ICTC* was decided before the NLRB struck down the Rules as illegal under the labor laws in *International Longshoremen's Ass'n (U.S. Naval Supply Center)*, 195 NLRB 273 (1972); before the Rules were augmented by the boycott provisions of the Dublin Supplement; and before the full emergence of the non-statutory labor exemption doctrine in Connell Construction Co. v. Plumbers & Steamfitters, 421 U.S. 616 (1975). (App. A at 21a n.11, 22a)

[18] The Third Circuit's analysis is consistent, however, with the views expressed by several other circuits. *E.g.*, Ackerman-Chillingworth v. Pacific Electrical Contractors Ass'n, 579 F.2d 484, 503 (9th Cir. 1978), *cert. denied*, 47 U.S.L.W. 3465 (U.S. Jan. 9, 1979) (Hufstedler, J., concurring and dissenting); Mackey v. National Football League, 543 F.2d 606, 614 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977) ("federal labor policy is implicated sufficiently to prevail only where the agreement sought to be exempted concerns a mandatory subject of collective bargaining"), *accord*, McCourt v. California Sports, Inc., 1979-1 CCH Trade Cas. ¶ 62,649 (6th Cir. May 22, 1979); National Ass'n of Women's & Children's Apparel Salesmen, Inc. v. FTC, 479 F.2d 139, 144 (5th Cir.), *cert. denied*, 414 U.S. 1004 (1973) ("the antitrust laws yield only insofar as the union pursues legitimate subjects of collective bargaining").

3. *Review of the Standards Formulated Under the Third Circuit's "Labor Policy" Defense Is Premature*

Petitioners claim that the Third Circuit improperly merged the issues of antitrust immunity and antitrust violation and, by so doing, formulated a new labor "exemption" test. That contention either misapprehends or mischaracterizes the decision below. The Court of Appeals carefully separated these issues and unequivocally rejected petitioners' claim of antitrust immunity: "[W]e hold that enforcement of [the] Rules and Dublin Supplement was not exempt under the Sherman Act." (App. A at 50a) Only after disposing of the antitrust "exemption" issue did the Third Circuit go on to fashion a limited "defense" to the treble damages sanction of § 4 of the Clayton Act. (App. A at 51a-54a)

To establish this defense, the Court of Appeals stated that petitioners, on remand, must demonstrate that: (1) there was no reasonable foreseeability that their agreements would be held to violate the national labor laws, *and* (2) the restraint imposed on the secondary market went no further than reasonably necessary to accomplish a labor objective they thought was legitimate. (App. A at 54a). Essentially, petitioners ask the Court to review the appropriateness of these standards. But that assumes the validity of such a defense in the first instance. As pointed out in respondents' Conditional Cross-Petition for a Writ of Certiorari, filed concurrently herewith, the Third Circuit's creation of a previously unknown "labor policy" defense to a private litigant's right to recover damages for antitrust injuries conflicts with two lines of this Court's precedents—those affording a broad remedial scope to § 4 of the Clayton Act and those delineating the scope of the non-statutory labor exemption. Since the availability of this defense is doubtful

under any circumstances, this Court might never need to reach the subsidiary question posed by petitioners.

Moreover, it is important to note that petitioners seek review only of the *second* element of the Third Circuit's two-pronged conjunctive test. It would be unnecessary for the District Court even to consider this criterion unless petitioners are *first* able to show that a reasonable collective bargainer could not have foreseen the ultimate invalidation of the Rules. As the Court of Appeals pointed out, "[petitioners'] burden of proving lack of foreseeability is formidable, considering the NLRB decision in *International Longshoremen's Assn., Local 1248 (U.S. Naval Supply Center)*, 195 N.L.R.B. 273 (1972), which held that the Rules were illegal over a year before the Dublin meeting." (App. A at 55a) Given the unlikelihood that petitioners will be able to prevail on this threshold issue, the question whether the second element of the test is unduly strict may be wholly immaterial. There is no reason, therefore, for this Court to review the decision below until the availability of the defense is determined in the first instance by the District Court.

Petitioners finally rest their argument upon speculative predictions of dire consequences if antitrust standards must be taken into account during collective bargaining. The short and complete response is that this Court already has explicitly rejected the notion that unions and employers may ignore the antitrust laws when they are seated at the bargaining table. *United Mine Workers* v. *Pennington*, *supra*, 381 U.S. at 664-65 ("because they must bargain does not mean that the agreement reached may disregard other laws"); *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 489 (1940) ("we must regard the question whether labor unions are to some extent and in some circumstances subject to the [Sherman] Act as settled in the affirmative").

4. *Application of the* Per Se *Doctrine Does Not Conflict With Any Other Decisions*

The Court of Appeals held that once the labor exemption is found inapplicable, the challenged conduct should be scrutinized under conventional antitrust principles, including, where appropriate, the *per se* doctrine. (App. A at 56a, 59a) That holding is entirely consistent with the precedents of this Court. In *Apex Hosiery Co.* v. *Leader*, *supra*, the Court explicitly stated that apart from the express limitations upon the reach of the antitrust laws set forth in the Clayton Act, the Sherman Act "makes no distinctions between labor and non-labor cases" and requires an "impartial application" to the "activities of industry and labor alike." *Id.*, 310 U.S. at 512. All of the members of the Court likewise agreed in *Pennington* and *Jewel Tea* that "settled antitrust principles" would be "appropriate and applicable" in determining whether non-exempt union-employer activities violate the antitrust laws. *Meat Cutters* v. *Jewel Tea Co.*, *supra*, 381 U.S. at 693 n.6 (White, J.); *id.* at 715 (Goldberg, J., concurring and dissenting); *id.* at 736-37 (Douglas, J., dissenting); *United Mine Workers* v. *Pennington*, *supra*, 381 U.S. at 673 (Douglas, J., concurring).

None of the cases cited by petitioners supports the proposition that anticompetitive labor agreements are exempt from *per se* analysis. Two of the cases, *Gough* v. *Rossmoor Corp.*, 585 F.2d 381 (9th Cir. 1978), *cert. denied*, 47 U.S.L.W. 3571 (U.S. Feb. 27, 1979); and *Oreck Corp.* v. *Whirlpool Corp.*, 579 F.2d 126 (2d Cir.) (*en banc*), *cert. denied*, —— U.S. ——, 99 S.Ct. 340 (U.S. Oct. 30, 1978), did not involve a labor agreement at all. Moreover, rather than repudiating the *per se* doctrine, both cases hold only that the particular conduct alleged did not fit within the categories of concerted

refusals to deal which traditionally are deemed *per se* unlawful. In the other cases cited, *Smith* v. *Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978); and *Mackey* v. *National Football League*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977), application of the *per se* rule was deemed inappropriate because of the peculiar economic characteristics of professional sports leagues, the setting in which those cases arose. Neither case suggests the need for a rule of reason inquiry in the instant cases.[19]

In sum, the Third Circuit's decision merely applies "settled antitrust principles" to the uncontroverted facts of record.[20] Contrary to petitioners' assertion, other courts have likewise applied the *per se* doctrine to anticompetitive labor activities where the nature of the restraint alleged has made that level of antitrust scrutiny appropriate. *South-East Coal Co.* v. *Consolidation Coal Co.*, 434 F.2d 767 (6th Cir. 1970); *Morse Bros., Inc.* v. *International Union of Operating Engineers*, 1974-2 CCH

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[19] Significantly, the only rationale petitioners have ever advanced for engaging in a rule of reason analysis in these cases is the labor policy favoring collective bargaining. As the Third Circuit pointed out, these arguments do not relate to any pro-competitive effects of the Rules and Dublin Supplement and would be foreclosed under the rule of reason in any event. National Soc'y of Prof. Eng'rs v. United States, 435 U.S. 679 (1978). (App. A at 60a) Petitioners understandably have never claimed that their agreements had a pro-competitive effect.

[20] The record below amply supports the Third Circuit's factual findings that respondents were competitors as well as customers of Sea-Land and Seatrain and, therefore, that the container boycott had both horizontal and vertical aspects. *See, e.g.*, Joint Appendix on Appeal from the United States District Court for the District of New Jersey, filed in the court below, at 238-39, 252, 263, 323, 327-28. Sea-Land's and Seatrain's facilities for consolidating LCL cargo are also described in Judge Lacey's opinion, Balicer v. International Longshoremen's Ass'n, *supra*, 364 F. Supp. at 218, and Sea-Land's LCL consolidation work is detailed in Sea-Land Service, Inc. v. Director, Office of Wkmn's Comp. Programs, 552 F.2d 985, 989-90 & nn.4, 6, 7 (3d Cir. 1977).

Trade Cas. ¶ 75,412 (D. Ore. 1974). *Cf. Ackerman-Chillingworth* v. *Pacific Electrical Contractors Ass'n*, *supra*, 579 F.2d at 490 n.7 (Ely, J.); *id.* at 496-99 (Hufstedler, J., concurring and dissenting). That mode of analysis creates no inexorable rules of decision and, as it is clearly required by this Court's precedents, does not warrant a grant of certiorari.[21]

5. *Rejection of the "Illegality" Defense*

Relying upon *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968), the Third Circuit rejected petitioners' so-called "illegality" defense as insufficient as a matter of law to bar respondents' recovery of damages under § 4 of the Clayton Act.[22] That decision is in accord with the overwhelming weight of judicial authority.

Petitioners rely principally upon the Tenth Circuit's decision in *Cottonwood Mall Shopping Center, Inc.* v. *Utah Power & Light Co.*, 440 F.2d 36 (10th Cir.), *cert. denied*, 404 U.S. 857 (1971). That case is factually distinguishable because it involved alleged injury to a *prospective*

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[21] Petitioners' argument is not helped by Continental TV, Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977). While holding *per se* rules inapropriate in cases involving vertical territorial restraints, the Court there confirmed that horizontal restraints of trade would remain subject to analysis under the *per se* doctrine. *Id.* at 58 n.28. *See also* St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531, 541-45 (1978).

[22] Petitioners' Fourth Question Presented implies that respondents have been operating illegally. Again, this mischaracterizes the record. As the Third Circuit pointed out, "Conex and Twin have always asserted that they are not freight forwarders within the meaning of Part IV of the Interstate Commerce Act, 49 U.S.C. § 1002(a)(5)(A), and that the operating authority granted them by the Federal Maritime Commission (FMC) sufficed." (App. A at 26a-27a) Respondents' position has always been that the lack of Part IV permits, *even if required*, cannot as a matter of law bar them from maintaining these actions.

business for which plaintiffs had been unable to obtain necessary licenses. Moreover, *Cottonwood* must be regarded as of doubtful authority in any event since the same circuit has subsequently rejected "illegality" defenses premised upon alleged violations of unrelated licensing statutes on four occasions: *Webb* v. *Utah Tour Brokers Ass'n*, 568 F.2d 670 (10th Cir. 1977); *Lamp Liquors, Inc.* v. *Adolph Coors Co.*, 563 F.2d 425 (10th Cir. 1977); *Adolph Coors Co.* v. *A&S Wholesalers, Inc.*, 561 F.2d 807 (10th Cir. 1977); and *Semke* v. *Enid Automobile Dealers Ass'n*, 456 F.2d 1361 (10th Cir. 1972).[23]

None of the other cases relied upon by petitioners supports a contrary result. Two were decided before this Court's 1968 decision in *Perma Life* effectively put an end to "illegality" defenses;[24] two are District Court decisions which, like *Cottonwood*, involved plaintiffs who were seeking *prospectively* to enter businesses for which they had been unable to obtain the necessary licenses;[25] and the last is also a District Court decision which, moreover, involved an inherently unlawful business.[26] Re-

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[23] The Ninth Circuit has likewise rejected the defense of "contributory illegality," Memorex Corp. v. IBM Corp., 555 F.2d 1379 (9th Cir. 1977); as the Third Circuit has done on two previous occasions, Health Corp. of America, Inc. v. New Jersey Dental Ass'n, 424 F. Supp. 931 (D.N.J. 1977), *mandamus denied without opinion sub nom.* New Jersey Dental Ass'n v. Brotman, No. 77-1268 (3d Cir. Feb. 24, 1977), *mandamus denied*, 434 U.S. 812 (1977); American Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230 (3d Cir. 1975).

[24] Okefenokee Rural Electric Mem. Corp. v. Florida Power & Light Co., 214 F.2d 413 (5th Cir. 1954); Maltz v. Sax, 134 F.2d 2 (7th Cir.), *cert. denied*, 319 U.S. 772 (1943).

[25] American Bankers Club, Inc. v. American Express Co., 1977-1 CCH Trade Cas. ¶ 61,247 (D.D.C. Jan. 18, 1977); Heath v. Aspen Skiing Corp. 325 F.Supp. 223 (D. Colo. 1971).

[26] Pearl Music Co. v. Recording Industry Ass'n of America, Inc., 460 F.Supp. 1060 (C.D. Calif. 1978) (record piracy).

spondents are aware of no appellate decision since *Perma Life* which has held that an antitrust plaintiff's non-compliance with an unrelated licensing statute prevents it from pursuing antitrust remedies for injuries to an *existing* business.

CONCLUSION

For all of the reasons stated, the petitions in Nos. 78-1902 and 78-1905 should be denied.

Respectfully submitted,

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